UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES, Plaintiff	)	
v.	)	IP-01-1158-H/K
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al., Defendant	)	

ENTRY DISCUSSING NON-DISPOSITIVE MOTIONS

Louis F. Gaines has sued this employer, White River Environmental Partnership, and affiliated entices (hereafter collectively "WREP" or "defendants) for what he asserts to be its discrimination against him on the basis of his race, sex and age and for retaliation against him. A multitude of non-dispositive motions are pending.

Whereupon the court, having read and considered the motions and responses thereto, and having also considered the evidentiary record, and being duly advised, now finds that the non-dispositive motions are properly resolved as specifically noted in this Entry.

I Specific Motions

The specific motions identified below are granted or denied, or otherwise resolved, through the following:

1. WREP's motions for instructions are granted, consistent with the specific rulings in this Entry. However, WREP's alternative requests in those motions that materials filed by Gaines be stricken as untimely or for reasons of formatting are denied.

2. Gaines' motion to grant summary judgment motion and to issue warning sanctions to the defendants is denied as without basis in law or fact. WREP's motion to strike that motion is sustained insofar as it is treated as an objection to Gaines' motion, and is denied to the extend that WREP seeks to have Gaines motion stricken.

3. Gaines' motion to prevent or help prevent the defendants' secondary retaliatory injury against the plaintiff, filed on July 25, 2002, is denied because the premise of such motion is misplaced in this action, either through the scope of the claims which are being litigated or the merit Gaines asserts those claims to possess. WREP's motion to strike the motion to prevent is treated as an objection to the motion to prevent, and as so treated is sustained, but is denied to the extent that WREP seeks to have the motion to prevent stricken.

4. WREP's motion to substitute the dated affidavits of various individuals, Ginny Suever, Pam Wolsiefer-Leak, Christie Hedge, Johnna

Krachinski, George Russell for their undated affidavits is granted. Gaines' motion to strike the undated affidavits of these individuals is denied.

5. With respect to Gaines' motion to determine admissibility of evidence of defendants' continuing violation and affidavit in support thereof, filed on October 23, 2001, the items appended to that motion are part of the expanded evidentiary record pertaining to the motions for summary judgment. The parties are thus notified that the items will be considered for that purpose, and to that extent Gaines' motion to determine admissibility is granted. The motion is denied to the extent that through such motion Gaines seeks to have a declaration of their admissibility, other than that the parties are notified that evidentiary materials will be considered to the extent consistent with the requirement of Rule 56(e) of the Federal Rules of Civil Procedure.

6. Gaines' motion to prevent defendants from making evasive, false and/or misleading representations in their reply to plaintiff's summary judgment motion, filed on October 23, 2001, is denied because through that motion Gaines attempts to reply to WREP's answer. A reply to the defendants' answer was not authorized, but the plaintiff's filing will be construed as a portion of his contentions in this motions.

7. Gaines' motion to strike Papier's appearance and to grant the requested summary judgment, filed on January 8, 2002, is denied because there is no basis on which to have attorney Papier's appearance stricken.

8. WREP's motion to amend answer, filed on February 13, 2002, is granted. The clerk shall file-stamp and docket the defendants' amended answer, and a copy of that document shall be included with the distribution of this Entry.

9. WREP's motion seeking an extension of the discovery cutoff date and an enlargement of time in which to respond to the plaintiff's motion for summary judgment are granted to the extent that any written discovery served prior to February 26, 2002, is considered timely and the defendants' response to the plaintiff's motion for summary judgment, filed on February 26, 2002, is deemed timely.

10. Gaines' motion seeking the maximum amount of time in which to respond to WREP's motion for summary judgment, filed on March 14, 2002, and April 19, 2002, are granted to the extent that Gaines filings in response to WREP's motion for summary judgment shall be deemed to have been timely filed. WREP's motions to strike and objections on grounds of timeliness are overruled.

11. Gaines' motion to strike WREP's filing in this action, including its motion for summary judgment and responses to Gaines's own filings, are each denied.

II. Remaining Non-Dispositive Motions

Each non-dispositive motion not specifically mentioned in Part I, of this Entry is denied. The reason for this ruling is that each such motion is without basis or significance in light of the claims, in light of the procedural development of the case,

and in light of the outcome which is compelled by the dispositive motions and the evidentiary record.

So ordered

s/ DAVID F. HAMILTON, Judge
United States District Court

Date: 9/30/02

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Note To Clerk: Processing this document requires actions in addition to docketing and distribution.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

LOUIS F. GAINES, Plaintiff	)	
v.	)	IP-01-1158-C-H/K
WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al., Defendant	)	

ENTRY DISCUSSING MOTIONS FOR SUMMARY JUDGMENT AND DIRECTING ENTRY OF FINAL JUDGMENT

Louis F. Gaines has sued his employer, White River Environmental Partnership, and affiliated entities (collectively, "WREP") for what he asserts to be is discrimination against him on the basis of his race, sex and age and for retaliation against him. The parties each seek resolution of Gaines' claims through the entry of summary judgment.

The court, having read and considered the motions and responses thereto, and having also considered the evidentiary record, and being duly advised, now finds that WREP's motion for summary judgment must be granted, and that Gaines' motions for summary judgment must be denied.

I. Summary Judgment Standard

Summary judgment is warranted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Factual disputes are 'genuine' only 'if the evidence is such that a reasonable jury could return a verdict for the [nonmovant]." *Oest v. Illinois Dep't of Corrections,* 240 F.3d 605, 610 (7th Cir. 2001) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)).

Rule 56 requires more than bald assertions of the general matter asserted, *Drake v. Minnesota Mining Mfg. Co.,* 134 F.3d 878, 887 (7th Cir. 1998). Affidavits must show affirmatively that the affiant is competent to testify to the matters stated therein and cite specific concrete facts establishing the existence of the truth of the matter asserted. FED. R. Civ. P. 56(e); FED. R. EVID. 602) witness permitted to testify only to those matters about which he or she has personal knowledge). Thus, the following are not properly included in an affidavit supporting or opposing summary judgment and will be disregarded: 1) conclusory allegations absent supporting evidence, *DeLoach v. Infinity Broad.,* 164 F.3d 398, 402 (7th Cir. 1999); *Aberman v. J. Abouchar & Sons, Inc.,* 160 F.3d 1148, 1150 (7th

Cir. 1998); 2) legal argument, *Pfeil v. Rogers,*

757 F.2d 860, 862 (7th Cir. 1985; 3) self-serving statements without factual support in the record; *Shank v. William R. Hague, Inc.*, 192 F.3d 675, 682 (7th Cir. 1999); *Smith Bus. Admin. v. Torres*, 142 F.3d 962, 968 (7th Cir. 1998); 4) inferences or opinions not "grounded in observation or other first-hand experiences," *Visser v. Packer Eng'g Assocs, Inc.*, 924 F.3d 655, 659 (7th Cir. 1991); 5) mere speculation or conjecture, *Stagman v. Ryan*, 176 F.3d 986, 995 (7th Cir. 1999); and 6) hearsay, *McFeely v. United States*, 700 F. Supp. 414, 417-418 (S. D. Ind. 1988). In addition, documents submitted in opposition to a motion for summary judgment must be properly identified by affidavit or otherwise admissible into evidence. See, e.g., *Friedel v. City of Madison*, 832 F.2d 965, 970 (7th Cir. 1987). The evidentiary materials submitted by the parties which comply with the foregoing standards will be considered in addressing the parties' motions for summary judgments, while the materials which do not comply with those standards will be disregarded. The motions to strike evidentiary materials, however, are denied.

II. Discussion

A. Statutory Overview

Title VII makes it an unlawful employment practice to discriminate against an individual on the basis of race, color, religion, sex, or national origin, 42 U.S.C. § 2000e-2(a). Title VII also provides that an employer may not take an adverse employment action or discriminate against an employee because he has opposed an unlawful

employment practice or has made a charge under the statue. See 42 U.S.C. § 2000e-3(a). The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621, et seq. makes it "unlawful for an employer ... to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a)(1). Other statutory provisions are described as warranted.

B. Timeliness and Scope of Claims

Gaines received a right to sue notice in Charge 240-99-1616 in July 1999. He had 90 days from the date of that receipt in which to file suit. He did not do so within the prescribed period, and the claims asserted here to the extent on No. 240-99-1616 are not available for resolution here. *Houston v. Sidley & Austin,* 185 F.3d 837, 830 (7th Cir. 1999); 42 U.S.C. § 2000e-5(f)(1).

Gaines filed a charge of discrimination with the EEOC in No. 240A10803 on January 22, 2001. Gaines' claims of race or sex discrimination based on event occurring before March 27, 2000 (300 days before January 22, 2001), and of age discrimination based on event occurring before July 26, 2000 (180 days before January 22, 2001), are time-barred. See *Harris v. Cook County Hospital,* 971 F. Supp. 329, 332 (N.D. Ill. 1997). Additionally, claims of race, sex, and age discrimination asserted in this action, but not included in No. 240A10803 or within the scope of that charge cannot be adjudicated in this action. *Cheek v. Peabody Coal Co.,* 97 F.3d 200, 202 (7th Cir. 1996) (citing *Harper v. Godfrey Co.,*

45 F.3d 143, 147-48 (7th Cir. 1995))

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C. Claims of Race, Sex and Age Discrimination

Gaines may prove his discrimination claims (race and sex under Title VII, and age under the ADEA) either by presenting direct evidence or by relying on the indirect, 'burden-shifting' method of proof outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981), and *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993). To avert summary judgment in an employment discrimination case, a plaintiff must present either evidence of discriminatory motivation or establish a prima facie case of discrimination under the *McDonnell Douglas* formula. *Sheehan v. Daily Racing Form, Inc.*, 104 F.3d 940, 940 (7th Cir. 1997).

Direct evidence is evidence which, if believed by the trier of fact, will prove the particular fact in question without reliance upon presumption or inference. *Plair v. E.J. Brach & Sons, Inc.*, 105 F.3d 343, 347 (7th Cir. 1997). The direct evidence must show that the defendant said or did something indicating discriminatory animus with regard to the specific employment decision in question. Id.

Gaines has not offered direct evidence of discrimination on any prohibited basis.

Under the alternative method, in *McDonnell*

Douglas, the Supreme Court" established an allocation of the burden of production and an order for the presentation of proof in Title VII discriminatory cases." *St. Mary's Honor Center, 509 U.S. at 506.* The test consists of three steps. First, the plaintiff must establish a prima facie case of discrimination. Second, once the prima facie case is established, the defendant must state a legitimate, non-discriminatory reason for the adverse employment action. Finally, if a legitimate, non-discriminatory reason is offered, the plaintiff must come forward to show that the stated reason is not the true one, but only a pretext to discrimination. See *McDonnell Douglas,* 411 U.S. at 802-04; *DeLoach v. Infinity Broadcasting,* 164 F.3d 398, 401 (7th Cir. 1999) (citation omitted).

* A prima facie case of racial discrimination requires a plaintiff to come forward with evidence that: 1) he is a member of a protected class; 2) he performed his job duties satisfactorily; 3) he suffered an adverse employment action; and 4) the employer treated similarly situated employees outside his protected classs differently. *Brummett v. Lee Enters., Inc.,* 284 F.3d 742, 744 (7th Cir. 2002); *Hoffman-Dombrowski v. Arlington Int'l Racecourse, Inc.,* 254 F.3d 644, 650 (7th Cir. 2001).

* A prima facie case under the ADEA requires a showing that 1) the plaintiff is within the protected group, i.e. over the age of 40, 2) the plaintiff's work performance met his employer's legitimate expectations, 3) the plaintiff suffered an adverse employment action, and 4) a substantially younger employee was treated more

favorable. *Vanasco v. National-Louis Univ.*, 137 F.3d 962, 065 (7th Cir. 1998).

All of Gaines' claims of discrimination require him to come forward with evidence that he suffered an adverse employment action. "[A] significant change in employment status" is necessary for an employment action to be considered adverse. *Bell v. Environmental Protection Agency*, 232 F.3d 546, 555 (7th Cir. 2000). An adverse change must be material, and "might be indicated by termination of employment, a demotion evidence by a decrease in wage or salary, a less distinguished title, a material loss of

benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *Rabinovitz v. Pena*, 89 F.3d 482, 488 (7th Cir. 1996) (quoting *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 136 (7th Cir. 1993). Gaines did not suffer a significant change in employment status with respect to the treatment he described in Charge No. 240A10803 because the treatment or decision he describes, for the most part, did not "constitute [] a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant in benefits." *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761 (1998); *Stutler v. Illinois Dep't of Corrections*, 263 F.3d 698, 703 (7th Cir. 2001).

Even for those items of alleged treatment that would constitute an adverse employment action,

Gaines cannot establish the final element of a prima facie case, which is that WREP treated similarly situated employees outside Gaines' protected class differently. Employees are similarly situated when there is substantial similarity with respect to their performance, qualifications, and conduct. *Radue v. Kimberty-Clark Corp.*, 219 F.3d 612, 617 (7th Cir. 2000). In cases involving allegations of discriminatory discipline, for example, the plaintiff must show that the two employees had the same supervisor, were subject to the same standards, and engaged in similar alleged misconduct. id. at 617-18. Gaines has not attempted that showing as to the majority of the specifications of his claims of discrimination, and as to the remaining claims he has simply identified other WREP employees he believes were treated more favorable than was he. Even as to this latter grouping; however, there is no evidence that the other WREP employees were similarly situated to Gaines in employment.

"Without a prima facie case, the plaintiff cannot withstand summary judgment." *Hong v. Children's Memorial Hosp.*, 993 F.2d 1257, 1261 (7th Cir. 1993) (citing *Gilty v. Village of Oak Park*, 919 F.2d 1247, 1250 (7th Cir. 1990). Gaines' failure to present a prima facie case of discrimination under either Title VII or the ADEA compels the court to grant WREP's motion for summary judgment as to such claims.

D. Claims of Retaliation

As noted above, Title VII also provides that an employer may not take an adverse employment action or discriminate against an employee

because he has opposed an unlawful employment practice or has made a charge under the statue. See 42 U.S.C. § 2000e-3(a).

Gaines filed charges of discrimination against WREP on February 26, 2001, in No. 240A11100 and on August 6, 2001, in No. 240A12467. In each instance, Gaines alleged retaliation for having filed a previous charge of discrimination.

In *Stone v. City of Indianapolis Public Utilities Div.*, 281 F.3d 640 (7th Cir. 2002), the Seventh Circuit Court of Appeals clarified the proper standard for summary judgment when a plaintiff claims that he was retaliated against for complaining about employment discrimination. With respect to a claim of retaliation, there is a direct evidence route to defeating a motion for summary judgment, as well as a modified *McDonnell Douglas* method. Under the direct method, a plaintiff must show that he engaged in protected activity and suffered an adverse job action as a result. Id. at 644.

The second route to summary judgment, adapting *McDonnell Douglas* to the retaliation context, requires the plaintiff to show that after filing the charge only he, and not any similarly situated employee who did not file a charge, suffered an adverse employment action even though he was performing his job in a satisfactory manner. Id. Otherwise a trial must be held. Id.

Gaines' claims of retaliation cannot survive WREP's motion for summary judgment under

either of the above tests:

* First, Gaines has produced no direct evidence of an adverse employment action based on his prior EEOC filings.

* Second, Gaines has not provided any evidence that he, and not any similarly-situated employee who did not file an EEOC complaint, was subjected to an adverse job action.

As with Gaines' Title VII and ADEA claims of discrimination, the failure to present evidence of an adverse employment action leads to the entry of summary judgment for the defendants. "Absent of direct evidence of retaliation, failure to satisfy any element of the prima facie case proves fatal to the employee's retaliation claim." *Hilt-Dyson v. City of Chicago,* 282 F.3d 456, 465 (7th Cir. 2000). Even it the court found a prima facie claim of retaliation (or proceeded to a further step in the analysis without such a finding), WREP has shown legitimate reasons for the policies and decisions Gaines challenges throughout this case, and Gaines has not shown these reasons to be a pretext. *Russell v. Acme-Evans Co.,* 51 F.3d 64, 68 (7th Cir. 1995) ("Pretext ... means a lie, specifically a phony reason for some action."); *Adreani v. First Colonial Bankshares Corp.,* 154 F.3d 389, 395 (7th Cir. 1998) (to show pretext, a discrimination plaintiff must examine each reason given by the employer and must raise an issue of fact regarding the honesty and credibility of each of the reasons"). WREP's motion for summary judgment must be granted as to Gaines' claims of retaliation.

E. Remaining Statutory Claims

Gaines has also asserted claims under several other statues, but they add nothing substantive to his case.

* The Title VII analysis controls any claim asserted pursuant to 42 U.S.C. § 1981. *Johnson v. City of Fort Wayne,* 91 F.3d 922, 940 (7th Cir. 1996).

* WREP does not act "under color of state law" sufficient to support a claim under 42 U.S.C. § 1983. *Moore v. Marketplace Restaurant,* 754 F.2d 1336, 1352 (7th Cir. 1985) (Section 1983 plaintiff must "demonstrate that state officials and the private party somehow reached an understanding to deny the plaintiffs their constitutional rights").

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* There is no private cause of action recognized for an OSHA violation. See 29 U.S.C. § 653(b)(4); *Ellis v. Chase Communication, Inc.,* 63 F.3d 473, 477 (6th Cir. 1995); *Crane v. Conoco, Inc.,* 41 F.3d 547, 553 (9th Cir. 1994).

III. Conclusion

"Employers may act for many reasons, good and bad; they may err in evaluating employees' strengths; unless they act for a forbidden reason, these errors (more properly, differences in assessment) do not matter." *Kuhn v. Ball State Univ.,* 78 F.3d 330, 332 (7th Cir. 1996). Certain of

Gaines' claims in this case were not timely filed, while others are within the scope of the charge of retaliation filed with the EEOC. As to the remaining claims of discrimination, Gaines has failed to come forward with evidence of all elements of a prima facie case, and WREP has produced unrebutted evidence of legitimate, non-discriminatory reasons for its action. Gaines' claims of retaliation fail for the same reasons, and his remaining statutory claims also lack merit.

Because the failure of proof of any essential element as to which the nonmovant (Gaines, in this case) bears the burden of proof, is fatal, *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23 (1986), because the burden at this point rests with Gaines to 'inform the trial judge of the reasons, legal or factual, why summary judgment should not be entered," *Liberles v. County of Cook,* 709 F.3d 1122, 1126 (7th Cir. 1983), and because Gaines has not met his burden in these circumstances, WREP's motion for summary judgment must be granted. Gaines' own motions for summary judgment must also be denied for essentially the same reason, which is that he has failed to show that, based on the evidentiary record, he is entitled to judgment as a matter of law.

Judgment consistent with this Entry shall now issue.

So ordered.

s/ DAVID F. HAMILTON, Judge
United States District Court

Date: 9/30/02

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA

LOUIS F. GAINES. Plaintiff v. WHITE RIVER ENVIRONMENTAL PARTNERSHIP, et al., Defendant	)	IP-01-1158-H/K

JUDGMENT

The court, having this day made its Entry,

IT IS THEREFORE ADJUDGED that the defendants' motion for summary judgment is granted, and judgment is entered for the defendants and against the plaintiff, and that this action is dismissed with prejudice.

The costs of this action are assessed against the plaintiff.

s/ DAVID F. HAMILTON, Judge
United States District Court

Date: 9/30/02

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